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EXTENSIONS OF REMARKS

INTELLIGENCE OVERSIGHT BILL AND 48-HOUR NOTICE

HON. HENRY J. HYDE
OF ILLINOIS
IN THE HOUSE OF REPRESENTATIVES

Thursday, July 28, 1988

Mr. HYDE. Mr. Speaker, at the beginning of August, the House will be voting on the Intelligence Oversight Act of 1988. In reaction to the Iran-Contra episode, this bill would impose mandatory notification to Congress within 48 hours of Presidential approval for a covert action. To help foster an intelligent debate on this serious subject, I would like to submit for the RECORD, in two installments, some publications on issues raised by the bill. Today I am presenting two articles. One, by Representative DICK CHENEY, focuses on the constitutional issues involved. A second, by Representative DAN LUNGREN, addresses operational considerations by discussing circumstances that have prompted CIA to invoke exceptions to normal notification practices. Both these Members sit on the House Permanent Select Committee on Intelligence, which held hearings on the bill.

The articles follow:

[From the Wall Street Journal, May 8, 1988]

COVERT OPERATIONS: WHO'S IN CHARGE?

(By Dick Cheney)

There is a consensus in Washington after Iran-Contra that the process for managing legislative relations on covert operations could be improved. The consensus quickly breaks down, however, as people begin putting forward concrete suggestions.

A bill, already passed by the Senate and moving forward in the House, would require the president under all conditions, with no exceptions, to notify Congress of covert operations within 48 hours of their start. It is a typical example of "never again" thinking by Congress. To make sure the last disaster will never again repeat itself, Congress is willing to deprive future presidents of all possible discretion under conditions Congress cannot possibly foresee.

At the heart of the dispute over this bill is a deeper one over the scope of the president's inherent constitutional power. I believe the president has the authority, without statute, to use the resources placed at his disposal to protect American lives abroad and to serve other important foreign-policy objectives short of war.

Congress does have the power, however, to control the money and material resources available to the president for covert actions. Because Congress arguably cannot properly fulfill its legislative function on future money bills without information, some kind of a reporting requirement can be understood as a logical extension of a legitimate legislative power.

LIMITING THE MONEY POWER

The constitutional question is: What are the limits to what Congress may demand as an adjunct of its appropriations power? Broadly speaking, Congress may not use that it would be unconstitutional for it to achieve directly. It could not place a condition on the salaries of judges, for example, to prohibit the judges from spending any time to reach a particular constitutional conclusion. In the same way, Congress could not use its clearly constitutional powers over executive-branch resources and procedures to invade an inherently presidential power.

How does this reasoning apply to the proposed 48-hour rule? In 1980, Congress revised the intelligence oversight law to require the president to notify the House and Senate intelligence committees before beginning any significant, anticipated intelligence activity. It justified the requirement on its need for information to fulfill its legislative power to appropriate money.

There is a line of Supreme Court cases, dating back to 1821, upholding Congress's implied power to demand information. But what happens if the power to demand information confronts another implied power held by another branch that is equally well grounded on a constitutional foundation? That was the issue in the executive-privilege case of *U.S. v. Nixon.* In that case, we learned that the decision in any particular case must rest on the competing claims of the two branches at odds with each other. That is how I think the 48-hour rule must be considered.

The 48-hour bill recognizes the president's inherent power to initiate a covert action—as long as that action is limited to resources already available to the president. If Congress ever tries to insist on advance approval, that would surely be overturned as a legislative veto.

But if the president has the inherent power to initiate covert actions, then the same rule that gives Congress the implied power to demand information also gives the president the implied powers he may need to put his acknowledged power into effect. In virtually all cases there is no conflict between the president's power to initiate an action and requiring the president to notify the intelligence committees (or a smaller group of leaders) of that operation in advance. In a very few rare circumstances, however, there can be direct conflict.

One good example was the Carter administration's decisions to withhold notification of some Iran hostage rescue operations. In one case, notification was withheld for about three months until six Americans could be smuggled out of the Canadian Embassy in Tehran. In fact, Canada made withholding notification a condition of its participation.

The Iranian hostage examples show that when notification has to be withheld may depend not on how much time has elapsed, but on the character of the operation. There is no question that when other governments place specific security requirements on cooperating with the U.S., the no-exceptions aspect of the 48-hour rule would be equivalent to denying the president his inherent power to act.

What is the constitutional justification for the proposed bill? The best argument, to quote the Senate Intelligence Committee, is that notification is needed "to provide Congress with an opportunity to exercise its responsibilities under the Constitution." The problem is that there is no legislative power that requires notification under all conditions during any precisely specified time period. All Congress needs to know is whether to continue funding ongoing operations.

Who should have the power to decide that notification would make action impossible? In the rare situation in which a president believes he must delay notification as a necessary adjunct to fulfilling his constitutional mandate, that decision must rest with the president. The president obviously cannot consult with Congress about whether to consult.

You could argue that failure to notify might, in the extreme, deprive Congress of this power. Iran-Contra was such an extreme. But the price of assuring notification within a specific time period is to make some potentially life-saving operations impossible. On the scale of risks, there is more reason to be concerned about depriving the president of his ability to act than about Congress's alleged inability to respond. Congress eventually will find out about decisions of any consequence. When that happens, it has the political tools to take retribution. President Reagan learned this dramatically. It is a lesson no future president is likely to forget.

The current approach certainly does have some problems. We have seen that it too often breeds frustration and mistrust in both the legislative and executive branches. This is not a one-sided problem. Congress had every reason to be angry about the way the National Security Council staff deceived us about the Contra resupply effort. But the president has just as much cause to be angry about the way the speaker and the Rules Committee use their scheduling power to delay, prevent or structure floor votes, about the way members can unilaterally decide that a previously covert operation is ripe for public debate, and about the incessant problem of leaks. Each side has good reason to think the other has contributed to a breakdown of comity.

What we need is a modified set of procedures that will permit each side to recognize the other's appropriate constitutional role. In this spirit, I offer the following as a framework for amending the Intelligence Oversight Act.

(1) The president should retain the constitutional power to initiate a covert action, even if some members of Congress consider the operation controversial.

(2) Requiring notification within 48 hours can be accepted in general, but only if there is an escape clause for the president to invoke unilaterally in exceptional circumstances.

Congress also needs to take steps to improve its own ability to protect secrets. Current procedures almost require an operation's cover to be blown before the operation can be discussed outside of committee. If Congress had adequate security laws and procedures, with stiff penalties for violations, the end result probably would be more frank discussion, not less.

As long as Congress is considering disclosure, let me make one more modest proposal. The U.S. needs only one secretary of state. No member of Congress ever should take it upon himself to negotiate with a foreign government. Fact finding is an acceptable part of a legislator's job. Negotiating is not. All discussions that even might turn

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.
Matter set in this typeface indicates words inserted or appended, rather than spoken, by a Member of the House on the floor.

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into negotiation, therefore, ought to be held only within a context of regular State Department communication and guidance.

A 48-HOUR RULE FOR CONGRESS

To help restore a proper respect for the separation of powers, it might be a good idea to apply something like the 48-hour rule in reverse. Members of Congress should be required to submit written reports to the State Department describing any communications they have with a foreign government within 48 hours after they occur.

Whether or not this proposal is accepted by Congress, it points to an important underlying issue. Legislative-executive relations did break down during the Iran-Contra affair. Congress made the president pay a stiff price for that breakdown, and the president has taken several important steps to improve procedures on his end of Pennsylvania Avenue. But the real problems are two-way. We in Congress ought to look at what we can do to improve our own behavior.

The 48-hour bill would "get back" at President Reagan by tying the hands of all future presidents. That approach will achieve nothing useful. The better way is with procedures that encourage each branch to respect the other's proper role. Comity comes through hard work on a daily basis. But the first step must be mutual respect.

(Rep. Cheney (R. Wyo.) is a member of the House Intelligence Committee and was the ranking minority member of the House Committee to Investigate Covert Arms Transactions with Iran.

[From the Sacramento Bee, May 20, 1988]

COVERT ACTION: A WISE SILENCE IF LIVES ARE SAVED

(By Dan Lungren)

Congress is at its worst when it passes laws that sound good, but that pose monumental difficulties for the average citizen—or, in the case at hand, for the American accused of being a "spy" who fervently hopes to "come in from the cold" in one unbloodied, untortured piece.

The House of Representatives is considering whether to follow the Senate's lead in approving "48-hour" legislation. This bill would require, without exception, that Congress be notified within two days of presidential approval for initiation of any covert action. Perhaps understandably, it is motivated by congressional pique over Iran-Contra, in which notice was not given until the ongoing action came to light 11 months later.

However, Congress has not objected previously when notification was significantly delayed. Those occasions, three in number, occurred during the Carter administration and also involved attempts to rescue U.S. citizens held hostage. Adm. Stansfield Turner, then CIA director, has since testified that, in good conscience, he could not have revealed the plans to anyone not actively helping with those operations. He told our committee that a security leak could have snuffed out the lives of people already in extreme danger.

To understand what this means in true life-and-death, terms, let us put ourselves in the place of one of those in such danger.

In November 1979, Iranian radicals seized the American Embassy in Tehran and held its staff of 52 hostage for over a year. But, unknown to the Iranians, to the world press or to Congress, six Americans had escaped to the nearby Canadian Embassy, where they were hidden and protected despite considerable risk to Canadian diplomats and staff. The Shiite radicals had amply demonstrated their willingness to ignore diplomatic immunity and international law, and they were proceeding to excute tens of thousands of Iranians suspected of ideological shortcomings. The hostage crisis dragged on, America agonized over the well-publicized suffering of its citizens at the Tehran embassy, and an already struggling president ran out of credibility.

Now, let us suppose you are an experienced agent assigned to the Near East division of CIA's Directorate of Operations—"Mr. Bond," we will call you. Fluent in Farsi and knowledgeable about Iranian sites and customs, you volunteer to facilitate by dangerous covert means that which cannot be done openly—to extract the six hostages trapped in the Canadian Embassy. A presidential "finding" approving this action is signed but withheld from Congress. For the next three months you train for the mission—coordinating with the Canadians, memorizing the details, familiarizing yourself with the equipment, immersing yourself in a new West German identity, and acquiring the necessary passport and other documentation.

Then you take the plung. You enter enemy territory without diplomatic immunity, knowing the radical Iranians would relish nothing more than to capture, parade before the world, interrogate and even execute a Yankee spy. You stay there a full week, even going so far as to survey operations at Tehran's Mehrebad airport. Finally, you rendezvous with the six Americans, also provided with forged identity papers, and boldly prepare to board an international flight. But a suspicious customs inspector questions one of your colleagues about why his passport shows only the middle initial "H.," whereas German passports always include the full name. You freeze inside, the lives of the entire party in the balance, but your colleague glibly extemporizes, "yes, you will notice I was born in 1935. I am ashamed of my middle name—Hitler." The dissembling works. The customs agent relents. You board the aircraft. Soon it takes off, and later you are safely beyond Iranian control.

This is a true story. And our Mr. Bond was ever so grateful that as he stood before the customs agent, CIA Director Turner already had determined not to tell anyone of this covert action before this group was safely on its way home. The slightest inkling of a possible U.S. operation would have placed already suspicious Iranian security forces on high alert. The Hitler explanation probably would not have satisfied them, if indeed our agent had even managed to survive the previous seven days inside Iran. Our agent must thank God for Turner's adherence to a strict need-to-know principle, and for his interpretation of a timely fashion to allow for a 3½-month delay.

And consider the true case of another agent, "Ms. Bond," let's call her. Despite the successful extraction of six hostages sheltered by Canada, the plight of many others remaining captive in the U.S. Embassy is unsolved. A military rescue mission is being considered, but U.S. aircraft would have to be refueled, and engineers are uncertain whether the desert floor in remote areas of Iran could support the weight of such aircraft. Ms. Bond volunteers to fly a light plane into Iran collect core samples of earth and return them to engineers for analysis. Despite known Iranian possession of U.S. Hawk radars and surface-to-air missiles, the mission is accomplished undetected, and engineers examining the samples determine that the site can serve as a refueling stop. Congress is not notified of Ms. Bond's mission. Similarly, Congress is not told of the subsequent failed Desert I rescue until after the fact, even though a full six months filled with feverish plans and preparations elapse after the initial decision to send Ms. Bond's team into Iran.

Put yourself in Ms. Bond's place. As you violated Iranian borders and flew deep into its territory in a light plane, wouldn't you be somewhat comforted by the fact that as few people as possible had been told of this mission? And think of those on the ground in Iran who risked their lives to provide the information and support necessary to plan and execute the rescue mission. Didn't we owe it to them to prevent, insofar as possible, the potential for a stray comment that would tip off the Iranians? Consider the hostages themselves, held in captivity for a full year by hostile fanatics. The merest hint of a U.S. military initiative could have prompted retaliation against them. Or at least have triggered, as eventually happened when the rescue failed, an Iranian decision to scatter them rendering a rescue mission impossible and also depriving hostages of the companionship of fellow Americans. Last, consider the safety of U.S. military personnel who volunteered for Desert 1, some of whom in fact paid the highest price. Consider those who loved them.

Other than with the Iran-Contra initiative, these are the only three occasions on which Congress was not notified, either immediately after or even before presidential approval of a planned covert action. Three out of four of these rare exceptions met with overwhelming congressional approval. All four involved attempts to free U.S. citizens held hostage, a problem that continues to exist and whose recurrence we can regrettably but confidently predict. So when the House debates the 48-hour legislation, we ought to put ourselves in the place of those hostages. Or perhaps we can even imagine, if just for a moment, that we are the true-to-life Agent 007 setting out to rescue the hostages.

(Rep. Dan Lungren, R-Long Beach, is a member of the House Permanent Select Committee on Intelligence.)

IN MEMORY OF RICHARD COX

HON. RALPH M. HALL

OF TEXAS

IN THE HOUSE OF REPRESENTATIVES

Thursday, July 28, 1988

Mr. HALL of Texas. Mr. Speaker, it is with a heavy heart that I acknowledge the death of my good friend, Richard Cox.

Mr. Cox was a pioneer McAllen attorney and a longtime civic leader who was 93 when he died on June 20, 1988, in McAllen. He was one of the finest men I have ever known—a true gentleman—whom I have long admired for his integrity and sense of public service.

After graduating from the University of Texas Law School, he became active in local McAllen politics and was not only a great and giving civic leader, but was an avid rotarian and was selected as a "Rotary Paul Harris Fellow."

He was always active in the Hidalgo County, TX and American Bar Associations, and served as a partner in the McAllen firm of Cox and Patterson, where he continued to practice law until his retirement at the age of 90.

He was a great leader, a loving family man, and one who either had—or took the time—to help every person who came his way.

My heartfelt sympathies go especially to his daughter, Dorothy Kiesler, who is my good

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